Filed 5/1/17 P. v. Watts CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Appellant, v. TELLY WATTS, Defendant and Respondent.	C080689 (Super. Ct. No. 15HC01740)

The People appeal from the trial court's order granting defendant Telly Watts's petition for habeas corpus. The People assert the court erred in striking one of his prior prison term enhancements on the ground the felony underlying the enhancement had been reduced to a misdemeanor pursuant to the resentencing provision of Proposition 47, Penal Code section 1170.18.[1] We agree and reverse the order.

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1 Undesignated statutory references are to the Penal Code.

BACKGROUND

We dispense with the facts of defendant's crimes as they are unnecessary to resolve this appeal.

On July 5, 2013, defendant pleaded guilty to second degree burglary (§ 459) and two counts of grand theft (§ 484g, subd. (b)) and admitted two prior prison term allegations (§ 667.5, subd. (b)). On August 13, 2013, the trial court sentenced defendant to a six-year four-month state prison term. One of the prison priors was based on a 2004 Yolo County conviction for second degree burglary. On March 25, 2015, the Yolo County Superior Court reduced the 2004 burglary conviction to a misdemeanor conviction for shoplifting (§ 459.5) pursuant to section 1170.18.

Defendant subsequently filed a habeas petition asking the trial court to strike both prison priors. The trial court granted the petition as to the 2004 prison prior.

DISCUSSION

The passage of Proposition 47, the Safe Neighborhoods and Schools Act (the Act), created section 1170.18, which provides in pertinent part: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of

Part 6." (§ 1170.18, subd. (k) ("subdivision (k)").) Since the prior prison term enhancement requires that defendant be convicted of a felony and have served a prison term for that conviction (§ 667.5, subd. (b)), this raises the question of whether a prior prison term enhancement based on what would now qualify as a misdemeanor conviction survives the Act.[2]

The People argue that Proposition 47 does not authorize a trial court to strike a prison prior based on a felony conviction that was subsequently reduced to a misdemeanor pursuant to section 1170.18. This argument asserts that section 1170.18 does not authorize a resentencing court to strike a prison prior, the text of Proposition 47 does not refer to the prior prison term enhancement, and reducing a felony conviction to a misdemeanor to does not apply retroactively to negate the prison prior.

"In interpreting a voter initiative, we apply the same principles that govern our construction of a statute. [Citation.] We turn first to the statutory language, giving the words their ordinary meaning. [Citation.] If the statutory language is not ambiguous, then the plain meaning of the language governs. [Citation.] If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the analyses and arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved. [Citations.]" (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

We begin by noting that section 1170.18 does not apply retroactively. Subdivision (k) was interpreted in the context of felony jurisdiction over criminal appeals in *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*). *Rivera* found that subdivision (k), which parallels the language from section 17 regarding the reduction of

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[2] This issue is currently before the California Supreme Court. (See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011.)

wobblers to misdemeanors,[3] should be interpreted in the same way as being prospective, from that point on, and not for retroactive purposes. (*Rivera*, *supra*, at p. 1100; see also *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [rejecting assertion that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) The court in *Rivera* accordingly concluded that the felony status of an offense charged as a felony did not change after the Act was passed, thereby conferring jurisdiction on the Court of Appeal.[4] (*Rivera*, *supra*, at pp. 1094-1095, 1099-1101.) We see no reason to depart from *Rivera*. Although *Rivera* addressed subdivision (k) in a different context, its analysis of subdivision (k) is equally relevant here.

Our interpretation of subdivision (k) is consistent with the Supreme Court's treatment of an analogous provision in *People v. Park* (2013) 56 Cal.4th 782 (*Park*). The Supreme Court held in *Park* that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b), could not subsequently be used to support an

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[3] Section 17, subdivision (b) states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . ."

[4] *Rivera* also noted the absence of any evidence that the voters wanted to go beyond directly reducing future and past punishment for convictions under the six included offenses. (*Rivera*, *supra*, 233 Cal.App.4th at p. 1100 ["Nothing in the text of Proposition 47 or the ballot materials for Proposition 47—including the uncodified portions of the measure, the official title and summary, the analysis by the legislative analyst, or the arguments in favor or against Proposition 47—contains any indication that Proposition 47 or the language of section 1170.18, subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction"].)

enhancement under section 667, subdivision (a). (*Park, supra,* 56 Cal.4th at p. 798.) Applying the reduction to eliminate an enhancement would be a retroactive application, which is impermissible under both section 17 and the Act. The distinction between retroactive and prospective application was recognized by the Supreme Court in *Park.* "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park*, *supra*, at p. 802.) Retroactive versus prospective application was also invoked by the Supreme Court in distinguishing cases cited by the Attorney General. "None of the cases relied upon by the Attorney General involves the situation in which the trial court has affirmatively exercised its discretion under section 17[, subdivision] (b) to reduce a wobbler to a misdemeanor before the defendant committed and was adjudged guilty of a subsequent serious felony offense." (*Park, supra*, at pp. 799-800.)

Park is not the only case where the Supreme Court found that reducing a felony to a misdemeanor pursuant to section 17 is not retroactive. For example, if a defendant is convicted of a wobbler and is placed on probation without imposition of sentence, the crime is considered a felony "unless subsequently 'reduced to a misdemeanor by the sentencing court' pursuant to section 17, subdivision (b)." (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439.) "If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively." (*Id*. at p. 439.) It has therefore long been the rule regarding section 17 that "as applied to a crime which is punishable either as felony or as misdemeanor: 'the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive

effect . . . .' " (*People v. Banks* (1959) 53 Cal.2d 370, 381-382, quoting *Doble v. Superior Court* (1925) 197 Cal. 556, 576-577 (*Doble*).)

Defendant attempts to distinguish section 17 from subdivision (k). He notes that under section 17, when a crime is punishable as a misdemeanor or felony, it is a "misdemeanor for all purposes" under various conditions including "[a]fter a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170." (§ 17, subd. (b)(1).) Relying on *Doble*, defendant contends that those terms are key to understanding why section 17 is not given retroactive effect. Since subdivision (k) does not use terms like "after" or when" to describe the treatment of offenses designated as misdemeanors, he concludes that it is distinguished from section 17, rendering the cases declining to give retroactive effect to section 17 inapposite.

The defendant in *Doble* was charged with various crimes including six offenses punishable as misdemeanors or felonies. (*Doble, supra*, 197 Cal. at pp. 557-558.) At that time, the statute of limitations for all misdemeanors was one year. (*Id*. at p. 558.) Since defendant was charged more than a year after the offenses, he contended that prosecution was barred. (*Ibid*.) The Supreme Court addressed the argument that the "for all purposes" language of section 17 barred prosecution because a misdemeanor judgment would have given both prospective and retroactive effect. (*Doble*, *supra*, at pp. 575-576.) The Supreme Court rejected this reasoning, as it "ignores the language—'after a judgment imposing a punishment other than imprisonment in the state prison'—following the phrase 'shall be deemed a misdemeanor for all purposes.' " (*Id*. at p. 576.) The high court held that "[a] fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section, the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor

for all purposes thereafter—the judgment not to have a retroactive effect so far as the statute of limitations is concerned." (*Doble*, *supra*, at pp. 576-577.)

The absence of the term "[a]fter a judgment imposing a punishment other than imprisonment in the state prison," does not support a retroactive application of subdivision (k). That phrase is used only in the provision of section 17 addressing an initial misdemeanor sentence, section 17, subdivision (b)(1). Under this provision, a felony conviction will be treated as a "misdemeanor for all purposes . . . . [¶] . . . When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (§ 17, subd. (b)(3).) As we have already discussed, this particular subdivision, which was at issue in *Park* and *Feyrer*, was not given retroactive effect in those cases. (See *People v. Feyrer, supra*, 48 Cal.4th at p. 439; *Park, supra*, 56 Cal.4th at pp. 787, 802.)

Subdivision (k) operates in the same manner, treating a felony conviction as a felony until it is reduced to a misdemeanor under section 1170.18. "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k).) Under the language of subdivision (k), a felony subject to Proposition 47 remains a felony *until* it is reduced to a misdemeanor pursuant to section 1170.18. As with section

17, subdivision (b)(3), reducing the felony to a misdemeanor pursuant to section 1170.18 is not given retroactive effect.[5]

A statute that "substantially changes the legal consequences of past events" is not applied retroactively absent clear legislative intent to do so. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) There is no evidence of a legislative intent to apply subdivision (k) retroactively. This is particularly true where, as here, the closely analogous language in section 17 is not applied retroactively. "Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears. [Citation.]" (*Estate of Griswold* (2001) 25 Cal.4th 904, 915-916.) "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source. [Citation.]" (*In re Harris* (1989) 49 Cal.3d 131, 136.) For these reasons, we also reject defendant argument that subdivision (k) should apply retroactively to advance the general purpose of Proposition 47.

Since subdivision (k) does not apply retroactively, the trial court lacked authority to strike the prison prior, and its order granting the habeas petition must be reversed.

DISPOSITION

The order granting defendant's petition for habeas corpus and striking the prior prison term is reversed. The trial court is directed to prepare an amended abstract of

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[5] We reject defendant's contention that the limitations on firearms in subdivision (k) sets forth the only limit on its application. That provision limits only the prospective application of subdivision (k) and does not address the issue of its retroactivity.

judgment reflecting the sentence as originally imposed, and to forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation.

NICHOLSON, Acting P. J.

We concur:

MURRAY, J.

DUARTE, J.